IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

APPEAL NO. 80093

CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, et al.,

Plaintiffs-Respondents,

v.

THE CITY OF ST. LOUIS, et al.,

Defendants-Respondents,

and

FIREMEN'S RETIRMENT SYSTEM OF ST. LOUIS, et al.,

Defendants/Intervenors-Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Division No. 3
Honorable Robert H. Dierker, Jr.

BRIEF OF RESPONDENTS CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS AND ITS MEMBERS NINA MURPHY, JOHN H. CLARK, AND KAY V. LEONARD

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JURISDICTIONAL STATEMENT

The Civil Service Commission of the City of St. Louis and its members (collectively, the "Commission") filed suit against the City of St. Louis, the Members of the Board of Aldermen of the City of St. Louis, and Mayor Clarence Harmon (collectively, the "City Defendants"), challenging the validity of Board Bill 110/Ordinance 64923, which amended the retirement plan and modified the compensation system for City of St. Louis firefighters. The Commission sought a declaratory judgment and injunctive relief because Board Bill 110/Ordinance 64923 had not been recommended by the Commission as required by Article XVIII of the Charter of the City of St. Louis. The Firemen's Retirement System of St. Louis, its trustees, St. Louis Firefighters Association Local 73, and four individual firefighters (collectively, the "Firefighter Defendant Intervenors") intervened as Defendants.

Upon stipulation of facts, briefs of the parties, and additional evidence submitted with the briefs, on July 25, 2001, the Circuit Court of the City of St. Louis, Honorable Robert H. Dierker, Jr., declared Ordinance 64923 invalid because the Commission had not recommended it as required by the City Charter. The Circuit Court enjoined implementation or enforcement of Ordinance 64923.

The Firefighter Defendant Intervenors appeal from the final judgment of the Circuit Court in favor of the Commission. The original City Defendants did not appeal the judgment. The appeal is filed with the Court pursuant to Article V, Section 3 of the Missouri Constitution because this appeal does not raise any of the matters within the exclusive jurisdiction of the Missouri Supreme Court. Because this appeal arises from a

judgment of the Circuit Court of the City of St. Louis, this Court has territorial jurisdiction pursuant to Mo. Rev. Stat. § 477.050 (2000).

STATEMENT OF FACTS

Respondents, the Civil Service Commission of the City of St. Louis and its members, Nina Murphy, John H. Clark, and Kay V. Leonard, filed suit for declaratory and injunctive relief to invalidate City Ordinance No. 64923. (L.F. at 1). Specifically, Respondents claimed that the Ordinance was enacted without the recommendation of the Commission as required by the St. Louis City Charter and was therefore invalid. (L.F. at 6). Defendants were the City of St. Louis, the Mayor, and the members of the Board of Aldermen (the "City Defendants"). (L.F. at 2). The Firemen's Retirement System of St. Louis, its trustees, the St. Louis Firefighters Association, Local 73, and four individual firefighters (the "Firefighter Defendant Intervenors") intervened as Defendants. (L.F. at 8, 50).

The facts are not disputed and the case was submitted on stipulated facts. (L.F. at 60, 66).

Plaintiff Commission was created pursuant to Article XVIII of the Charter of the City of St. Louis (the "St. Louis Charter") for the administration of civil service rules and regulations in the City of St. Louis. (L.F. at 60). Article XVIII, Section 7 of the Charter of the City of St. Louis sets forth the powers and duties of the Commission. (L.F. at 62). With respect to ordinances, the Charter provides that the Commission shall have the power, and it shall be its duty:

> To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:

(1) a compensation plan providing properly related scales of pay for all grades of positions, and rules for its interpretation and application;

(2) a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri;

(3) regulation of hours of duty, holidays, attendance and absence;

(4) such other matters within the scope of this article as require action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be deemed to be warranted.

St. Louis City Charter art. XVIII, § 7(b) (emphasis added).

With respect to the obligations of the Mayor and Board of Aldermen regarding civil service matters, the Charter states, in part:

The Mayor and Aldermen shall provide, by ordinance:

(a) Compensation plan. For adoption of a comprehensive compensation plan for the fixing of rates of pay of all employees in the classified service, and amendments thereto, on recommendation of the civil service commission, and for its application and interpretation. . . .;

(b) Retirement system. For a contributory retirement system on a sound actuarial basis, if and when permissible under the Constitution and Laws of the State of Missouri, to provide for retirement of employees in the classified service who have become unable to

render satisfactory service by reason of physical or mental incapacity;

(c) Hours of duty and holidays. For regulating hours of duty, holidays, attendance, an absence, in the classified service; . . .

St. Louis City Charter art. XVIII, § 4(a)-(c). The firefighters of the City of St. Louis are all employees of the City in the classified service. (L.F. at 66).

During the 1998-99 legislative session, the Missouri Legislature adopted certain amendments to legislation dealing with various retirement systems, including the St. Louis City Firemen's Retirement System (the "Firemen's Retirement System"). See Senate Bill 308. (L.F. at 62). Specifically, Senate Bill 308 amends Section 87.371 governing unused sick leave. As stated in the Bill Summary, "This act allows any member of the St. Louis City Firemen's Retirement System who is participating in the Deferred Retirement Option Plan (DROP) program to elect to have the equivalent of his sick leave hours placed in his DROP account." (L.F. at 62). This legislation became effective on August 28, 1999. (L.F. at 62).

In the summer of 1999, Board Bill 110, providing for changes to Chapter 4.18 of the City Code, was introduced in the Board of Aldermen. (L.F. at 62). The Bill was designed to amend Section 4.18.386 entitled "Accumulated Sick Leave," to mirror the language of Section 87.371 of the Firemen's Retirement Act, as amended by Senate Bill 308. (L.F. at 62).

By correspondence dated August 9, 1999, the Commission advised Mayor Harmon, President of the Board of Aldermen Francis Slay, and the members of the Board

of Aldermen that Board Bill 110 had neither been considered nor recommended by the Commission for passage by the Mayor or the Board of Aldermen. (L.F. at 62-63).

During the Spring 2000 legislative session, the Board of Aldermen approved Board Bill 110. (L.F. at 63). The Commission had not recommended Board Bill 110 at the time the Board of Aldermen first approved the Bill. (L.F. at 63).

By correspondence dated March 22, 2000, the Commission advised Mayor Harmon that Board Bill 110 had been improperly approved by the Board of Aldermen because the Commission had not recommended the Bill. (L.F. at 63). On March 31, 2000, Mayor Harmon vetoed Board Bill 110. (L.F. at 63).

On April 17, 2000, the Board of Aldermen adopted Board Bill 110 by overriding the Mayor's veto. (L.F. at 63). Board Bill 110 became effective on April 17, 2000, and became known as Ordinance 64923. (L.F. at 63, 87).

The Board of Aldermen and the City have, by this Ordinance, changed certain aspects of the terms of the City Firefighters' Retirement System. (L.F. at 63). The Board of Aldermen and the City have also, by this Ordinance, changed the rate of sick leave accrual for City firefighters. (L.F. at 66-67). The Board of Aldermen did not obtain the Commission's recommendation prior to adoption of the Ordinance, as required by the St. Louis Charter. (L.F. at 63).

Implementation of the amendment as provided for in Board Bill 110/Ordinance 64923 would, according to the actuaries for the Firemen's Retirement System, result in an estimated net increase in retirement system liabilities in excess of $8 million, resulting in a total estimated annual cost of $1,005,000.00 to the City of St. Louis. (L.F. at 63-64).

The case was submitted for decision to the Honorable Robert H. Dierker, Jr. of the Circuit Court of the City of St. Louis, and on July 25, 2001, the Court issued a Judgment declaring Ordinance 64923 illegal and of no force or effect since it was adopted without recommendation of the Commission as required by the St. Louis City Charter. (L.F. at 276). The Court further enjoined the Defendants and Intervenor Defendants from implementing or enforcing Ordinance 64923, except the Court ordered that the judgment shall operate prospectively only and shall not affect the benefits of those who retired prior to the date of Judgment. (L.F. at 276-277).

The Defendant Intervenors Firemen's Retirement System of St. Louis, its trustees, St. Louis Firefighters Association, Local 73, and the four individual firefighters, appealed. (L.F. at 280); (L.F. at 297). The City Defendants did not appeal.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DECLARING ORDINANCE 64923 VOID AND INVALID BECAUSE THE CITY CHARTER REQUIRES COMMISSION RECOMMENDATION OF THE ORDINANCE IN THAT:

A. THE CHARTER EXPRESSLY REQUIRES COMMISSION RECOMMENDATION FOR ORDINANCES AFFECTING THE COMPENSATION PLAN OF EMPLOYEES.

B. WHEN READ AS A WHOLE, THE CHARTER CLEARLY REQUIRES COMMISSION RECOMMENDATION OF ORDINANCES AFFECTING THE RETIREMENT PLAN OF EMPLOYEES.

C. THE MISSOURI SUPREME COURT, IN ABERNATHY V. CITY OF ST. LOUIS, CLEARLY HELD THAT ANY ORDINANCE PERTAINING TO CIVIL SERVICE MUST RECEIVE COMMISSION APPROVAL BEFORE IT IS ENACTED AND ABERNATHY IS CONTROLLING IN THIS SITUATION.

Abernathy v. City of St. Louis, 313 S.W.2d 717 (Mo. 1958)

Kirby v. Nolte, 173 S.W.2d 391 (Mo. 1943) (en banc)

St. Louis City Charter art. XVIII, § 4(a)-(c); § 7(b)

II. THE TRIAL COURT DID NOT ERR IN DECLARING ORDINANCE 64923 VOID AND INVALID BECAUSE THE COMMISSION'S PRIOR FAILURE TO RECOMMEND SUCH ORDINANCES IS NOT RELEVANT IN THAT IT DOES NOT CONSTITUTE WAIVER OR LACHES UNDER THE LAW.

Acetylene Gas Co. v. Oliver, 939 S.W.2d 404 (Mo. Ct. App. 1996)

Conservative Fed. Sav. & Loan Ass'n v. Warnecke, 324 S.W.2d 471 (Mo. Ct. App. 1959)

Ward v. Hudgens, 22 S.W.3d 260 (Mo. Ct. App. 2000)

ARGUMENT

This case involves the interpretation of the respective powers of the Commission, the Mayor, and the Board of Aldermen under Article XVIII of the St. Louis City Charter. In construing Article XVIII of the Charter, the Court must give effect to the intent of the framers. State ex rel. McCulloch v. Hoskins, 978 S.W.2d 779, 782 (Mo. Ct. App. 1998). As explained before the trial court, as well as herein, the legal principles governing legislative intent clearly lead to the conclusion that Commission recommendation of Ordinance 64923 was required. Furthermore, the Missouri Supreme Court's decision in Abernathy v. City of St. Louis, 313 S.W.2d 717 (Mo. 1958), dictates this conclusion. Contrary to Appellants' assertions, Abernathy cannot be disregarded. As a result, the trial court did not err in finding for the Commission, and this Court should uphold the judgment of the trial court.

With respect to ordinances, the Charter provides that the Commission shall have the power, and it shall be its duty:

> To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:
>
> (1) a compensation plan providing properly related scales of pay for all grades of positions, and rules for its interpretation and application;
>
> (2) a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri;
>
> (3) regulation of hours of duty, holidays, attendance and absence;

(4) such other matters within the scope of this article as require action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be deemed to be warranted.

St. Louis City Charter art. XVIII, § 7(b) (emphasis added).

With respect to the obligations of the Mayor and Board of Aldermen regarding civil service matters, the Charter states, in part:

The Mayor and Aldermen shall provide, by ordinance:

(a) Compensation plan. For adoption of a comprehensive compensation plan for the fixing of rates of pay of all employees in the classified service, and amendments thereto, on recommendation of the civil service commission, and for its application and interpretation. . . .;

(b) Retirement system. For a contributory retirement system on a sound actuarial basis, if and when permissible under the Constitution and Laws of the State of Missouri, to provide for retirement of employees in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity;

(c) Hours of duty and holidays. For regulating hours of duty, holidays, attendance, and absence, in the classified service; . . .

St. Louis City Charter art. XVIII, § 4(a)-(c). All of the City of St. Louis firefighters are "employees in the classified service." (L.F. at 66-67).

As the trial court noted, "It is at once apparent that article XVIII of the City Charter endows the Civil Service Commission Members with broad powers in administering the City's civil service system." (L.F. at 269). The trial court correctly concluded that these provisions required that the Commission recommend Ordinance 64923. The Commission did not, and therefore, the Ordinance is void.

The standard of review on appeal in a court-tried case with stipulated facts and exhibits is whether the trial court drew the proper legal conclusion from the facts. Cottey v. Schmitter, 24 S.W.3d 126 (Mo. Ct. App. 2000). On appeal, the trial court's judgment is presumed valid and the burden is on appellants to demonstrate the incorrectness of the judgment. Tri-State Motor Transit Co. v. Holt, 921 S.W.2d 652, 656 (Mo. Ct. App. 1996); Holeyfield v. Holeyfield, 847 S.W.2d 175, 178 (Mo. Ct. App. 1993). Moreover, the court of appeals must uphold the trial court judgment under any reasonable theory pleaded and supported by the evidence. Whiteside v. Rottger, 913 S.W.2d 114, 119 (Mo. Ct. App. 1995).

Appellants have not shown that the trial court's judgment was incorrect. Thus, the decision of the trial court must be upheld.

I. THE TRIAL COURT DID NOT ERR IN DECLARING ORDINANCE 64923 VOID AND INVALID BECAUSE THE CITY CHARTER REQUIRES COMMISSION RECOMMENDATION OF THE ORDINANCE IN THAT:

A. THE CHARTER EXPRESSLY REQUIRES COMMISSION RECOMMENDATION FOR ORDINANCES AFFECTING THE COMPENSATION PLAN OF EMPLOYEES.

Ordinance 64923 affects compensation, as well as retirement, and thus under Article XVIII, Section 4(a) of the City Charter, the recommendation of the Commission was expressly required. Section 4(a) of Article XVIII of the St. Louis Charter expressly states that the Mayor and the Board of Aldermen shall provide, by ordinance, "[f]or adoption of a comprehensive compensation plan for the fixing of rates of pay of all employees in the classified service, and amendments thereto, on recommendation of the civil service commission, and for its application and interpretation. . . ." St. Louis City Charter art. XVIII, § 4(a) (emphasis added). Ordinance 64923 affects the comprehensive compensation plan of the firefighters. The Board of Aldermen did not receive the Commission's recommendation before adopting the Ordinance over the Mayor's veto. (L.F. at 63). As a result, under Article XVIII, Section 4(a), the Ordinance is clearly invalid.

The trial court did not address the argument that the Ordinance affects "compensation," finding for the Commission on other grounds. However, this Court may uphold the trial court's decision by finding that Commission recommendation was expressly required under Article XVIII, Section 4(a) of the St. Louis Charter. Whiteside,

913 S.W.2d at 119 (appellate court may uphold that court judgment under any reasonable theory pleaded and supported by the evidence).

The Missouri Supreme Court interpreted the respective obligations of the Commission, Mayor, and Board of Aldermen under this compensation provision in Kirby v. Nolte, 173 S.W.2d 391 (Mo. 1943) (en banc). In Kirby, the Commission brought suit against the Board of Aldermen seeking a ruling that the Board of Aldermen could not adopt, and the Mayor could not approve, any classification or compensation plan for civil service employees unless such plans are recommended by the Commission.

The court referred to Section 4(a) of Article XVIII of the Charter, which requires the Mayor and the Board of Aldermen to provide by ordinance for a comprehensive compensation plan "on recommendation of the Civil Service Commission." Id. at 392. The court noted that the issue was the meaning and effect of the words "on recommendation of the Civil Service Commission." The court discussed the ability of the people of the City of St. Louis, through their Charter, to place limits on the legislative authority of the Mayor and Board of Aldermen. The court noted that while the fixing of a wage policy and rate of pay is ordinarily a legislative function, "the people of St. Louis, through an amendment to the charter, may properly impose a limitation on the legislative power to permit the fixing of such rates only on the recommendation of the commission." Id.

As a result, the court found the language "on recommendation of the Civil Service Commission" to be mandatory and concluded:

> We hold that Article VIII, Section 7, which provides that the board of aldermen shall by ordinance fix, or provide the fixing of, salaries or compensation for city employees, is subject to the limitations imposed by the amendment. Accordingly, the board may not fix salaries without the recommendation of the commission.

Id. Therefore, the court affirmed the trial court's decision in favor of the Commission. See also State ex rel. St. Louis Fire Fighters Ass'n Local No. 73 v. Stemmler, 479 S.W.2d 456, 457 (Mo. 1972) (en banc) (Article XVIII, § 4(a) provides that the "board of aldermen shall adopt a plan of compensation fixing rates of pay for all employees in the classified service (including firemen) on recommendation of the civil service commission.")

Ordinance 64923 affects the compensation plan of the City firefighters who are employees in the classified service. Words contained in a statute or ordinance should be given their plain and ordinary meaning. McCollum v. Dir. of Revenue, 906 S.W.2d 368, 369 (Mo. 1995) (en banc). See also St. Louis County v. State Highway Comm'n, 409 S.W.2d 149, 152 (Mo. 1966) (words of common use are construed in accordance with their natural and ordinary meaning). However, if the legislature has defined that term, that special definition must be given effect. St. Louis Country Club v. Admin. Hearing Comm'n, 657 S.W.2d 614, 617 (Mo. 1983) (en banc).

The term "compensation" is defined in Article XVIII of the City Charter. Section 1(e) of Article XVIII states:

> 'Compensation' means the salary, wages, fees, allowances, and all other forms of valuable consideration, earned by or paid to any employee by reason of service in any position, but does not include any allowance for expenses authorized and incurred as incidents to employment.

St. Louis City Charter art. XVIII, § 1(e) (emphasis added). Similarly, Black's Law Dictionary defines the word "compensation" as:

> Remuneration and other benefits received in return for services rendered; esp., salary or wages. "Compensation consists of wages and benefits in return for services. It is payment for work. . . . [Compensation] includes wages, stock option plans, profit sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement." Kurt H. Decker & H. Thomas Felix II, Drafting and Revising Employment Contracts, § 3.17 at 68 (1991).

Black's Law Dictionary 277 (7th ed. 1999) (emphasis added). Thus, the term "compensation" clearly includes all forms of remuneration, including sick pay.

The Ordinance affects the consideration received by firefighters. Not only does it clearly affect the retirement benefits received, but the Ordinance, in limiting the rate at which sick leave can be credited, affects the payments received by firefighters. The Ordinance provides, in part:

> (2). No member working on or after June 1, 1999, shall be credited with sick leave at a rate less than the rate being earned on June 1, 1999, nor shall

> any cap or limit applied to accumulated sick leave after June 1, 1999, be construed as a limit on the number of sick days actually earned without reference to the cap or limit which may be credited pursuant to the provisions of this section. When calculating years of service, each member shall be entitled to one day of creditable service for each day of unused accumulated sick leave earned by the member.

(L.F. at 87).

The Ordinance provides a threshold rate at which sick leave will be credited. The Ordinance further provides that no cap or limit applicable to accumulated sick leave after June 1, 1999, shall affect the number of sick days actually earned. This Ordinance amending Section 4.18.386 of the City Code regarding "Accumulated Sick Leave" clearly affects the firefighters' compensation plan.

Appellants presented no evidence to the trial court showing that the compensation of the firefighters is not affected by the Ordinance. In fact, the Supplemental Joint Stipulation of Facts is clear evidence that the compensation of retiring firefighters is directly affected by the Ordinance. (L.F. at 66-67). These stipulations set forth the economic value of the sick leave days at issue. (L.F. at 66-67).

Accrual of sick leave is included in each of the City's regular ordinances establishing the compensation plan for all City employees in the classified service, including the Firefighters. See (L.F. at 240). As an example, Ordinance 64954 was recommended by the Civil Service Commission before being adopted by the Board of Aldermen without objection by the Firefighters or the Firemen's Retirement System.

(L.F. at 207). Ordinance 64954 addresses compensation levels, accrual of sick leave, accrual of vacation time, and retirement for the City firefighters, as well as all other City employees in the classified service.[1] As noted by the Missouri Supreme Court in Stemmler, subject to the parity amendment of Section 31 of Article XVIII, the Civil Service Commission may propose whatever rates they conclude are appropriate (for firefighters) and the recommendation then goes, as in Kirby, to the aldermen for enactment or rejection." Stemmler, 479 S.W.2d at 461.

Like Ordinance 64954, Ordinance 64923 pertains in part to the compensation plan for civil service employees in that it affects the accrual of employee sick leave. Accrual of sick leave is clearly a compensation issue. See Black's Law Dictionary 277 (7th ed. 1999). Thus, under Section 4(a) of Article XVIII, the Commission recommendation was expressly required before adoption of the Ordinance. Defendants did not obtain the Commission's recommendation. Thus, the trial court did not err in declaring the Ordinance void.

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[1] The Firefighters' statement in their Brief that "the Commission cannot set the salary of a firefighter at a different rate than that of a police officer of comparable rank," (Firefighters' Brief at 24) is incorrect. Pursuant to Ordinance 58678, when the state legislature failed to provide a raise for City police officers, the Firefighters, without objection, were given a raise based on the recommendation of the Commission.

B. WHEN READ AS A WHOLE, THE CHARTER CLEARLY REQUIRES COMMISSION RECOMMENDATION OF ORDINANCES AFFECTING THE RETIREMENT PLAN OF EMPLOYEES.

1. Sections 4 and 7 of the Charter Clearly Require Commission Recommendation of Ordinances Affecting the Retirement Plan of Employees.

The trial court held that the Ordinance required Commission recommendation pursuant to Section 4(b) of the City Charter. The trial court further found that such recommendation was not provided and thus, Ordinance 64923 was invalid. This was the proper legal conclusion, and therefore, this Court should affirm the trial court's judgment.

The parties stipulated that the Ordinance affects the City Firefighters' Retirement System. (L.F. at 63). With respect to the Commission's duties in connection with ordinances relating to retirement systems, the Charter states that the Commission shall have the power, and it shall be its duty:

> To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for: . . . (2) a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri. . . .

St. Louis City Charter art. XVIII, § 7(b). Furthermore, with respect to the duties of the Mayor and the Board of Aldermen in connection with such ordinances, Section 4 states that the Mayor and the Board of Aldermen shall provide, by ordinance:

> (b) Retirement system. For a contributory retirement system on a sound actuarial basis, if and when permissible under the Constitution and Laws of the State of Missouri, to provide for retirement of employees in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity.

St. Louis City Charter art. XVIII, § 4(b).

Although unlike Section 4(a) relating to compensation plans, Section 4(b) does not contain an express referral to Commission recommendation, the requirement of the Commission recommendation is clearly implied when Article XVIII, including both sections 4 and 7, is read as a whole. Appellants argue that since Section 4(b) does not expressly include the language regarding Commission recommendation, it must be presumed that the omission was intended. See Firefighters' Brief at 15-16; Retirement System's Brief at 21-22. However, this argument ignores other principles of statutory construction, including its primary purpose: to determine and follow the framers' intent.

In construing a city charter, a court must give effect to the intent of the framers. State ex rel. McCulloch v. Hoskins, 978 S.W.2d 779, 782 (Mo. Ct. App. 1998). Courts generally seek to ascertain the intention of lawmakers by giving the words their ordinary meaning, by considering the entire act and its purpose, and by seeking to avoid unjust, unreasonable, confiscatory, or oppressive results. State ex rel. Jackson County v. Spradling, 522 S.W.2d 788, 791 (Mo. 1975) (en banc); State ex rel. Dir. of Revenue v. Scott, 919 S.W.2d 296, 301 (Mo. Ct. App. 1996) (law favors statutory construction that

harmonizes with reason, gives effect to legislature's intent, and tends to avoid absurd results). As explained by this Court:

> [T]he primary rule of construction, whether of statutes or ordinances, is to ascertain and give effect to lawmakers' intention, and that since such laws are presumably passed in the spirit of justice and for the welfare of the community, they should be interpreted, if possible, so as to further that purpose, and . . . to attain that end, [courts will] look less to letter or words of a statute or ordinance and more to the context, the subject matter, the consequence and effect, and the reason and spirit of the law in endeavoring to arrive at the purpose of the lawgiver.

City of St. Louis v. James Braudis Coal Co., 137 S.W.2d 668, 669 (Mo. Ct. App. 1940) (emphasis added).

If possible, each section of an ordinance should be given a construction in harmony with rest of ordinance. Trio Mobile Home Park, Inc. v. City of St. Charles, 390 S.W.2d 432, 435 (Mo. Ct. App. 1965). As specifically discussed in the context of Article XVIII, Section 3(g) of the City Charter, "[i]n analyzing this subsection, we must follow the general rule governing the interpretation and construction of Charter provisions which requires us to construe subsection (g) in conjunction with the rest of the Charter." Banta v. City of St. Louis, 662 S.W.2d 899, 903 (Mo. Ct. App. 1983). Thus, Section 4(b) should also be read in conjunction with the rest of the Charter.

Moreover, the Section 3, Article XVIII at issue in Banta, in discussing the scope of civil service rules, provides that in the areas of both compensation and retirement, the Commission's rules must provide for recommendations by the Commission. Section 3 is designed "to give effect to the purpose and requirements set forth in the next preceding section" (which is Article 4 governing the Mayor and Board of Aldermen). Thus, the intent in Section 3 is clearly that the recommendation requirement applies to both compensation plans and retirement systems.

Similarly, in Section 7, in discussing the Commission's authority and duties, there is no distinction between compensation and retirement. For both situations, the Charter states "the Commission shall have the power, and it shall be its duty . . . (b) to recommend to the Mayor and Aldermen, in accordance with this article, ordinances. . . ." St. Louis City Charter art. XVIII, § 7. As a result, based on legislative intent, the clause "on recommendation of the Civil Service Commission" is included in subsection (b) of Article XVIII, Section 4, and well as subsection (a).

The Retirement System argues in its Brief that the language in Section 7 should be read as imposing an advisory role on the Commission. Yet, it is well accepted that the use of the word "shall" in a statute or ordinance imposes a mandatory duty, not a discretionary or advisory role. See State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 920 (Mo. 1993) (en banc); Citizens for Rural Preservation, Inc. v. Robinett, 648 S.W.2d 117, 132 (Mo. Ct. App. 1982). Clearly, the obligations and duties imposed on the Commission in Section 7, including the duty to recommend ordinances regarding the retirement plans for employees in the classified service, is a mandatory duty and the

language of Section 7 should not be dismissed as suggesting that the Commission merely may have an advisory role.

To hold otherwise would destroy the underlying purposes of Article XVIII. The Missouri Supreme Court has discussed the purposes of Article XVIII of the City Charter, noting:

> The article has been before this court on several occasions and each time the court has stated its general purpose 'to provide a form of civil service for city employees in the classified service designed so as to insure employment and continuity of service on grounds of merit and fitness.'

Sanders v. City of St. Louis, 303 S.W.2d 925, 928 (Mo. 1957) (*citing* Kirby v. Nolte, 173 S.W.2d 391 (Mo. 1943) (en banc)). See also City of St. Louis v. Smith, 228 S.W.2d 780, 782 (Mo. 1950) (en banc) (purpose of civil service provisions is "to provide a modern and comprehensive system of personnel administration for the city, whereby economy and effectiveness in the personal services rendered by the City, and fairness and equity to the employees and the taxpayers of the City, alike, may be promoted").

Courts must consider the purpose or goal of the statute and any relevant conditions existing at the time it was enacted in interpreting a statute. State v. White, 622 S.W.2d 939, 944 (Mo. 1981) (en banc). That which is clearly implied in a statute is as much a part of it as that which is expressed. State ex rel. O'Connor v. Riedel, 46 S.W.2d 131, 135 (Mo. 1932) (en banc); Bowers v. Mo. Mut. Ass'n., 62 S.W.2d 1058, 1063 (Mo. 1933). As noted by the Missouri Court of Appeals, Western District, "resort to the necessary implications of the [statutory] language to determine legislative intent is

permitted." Mo. Ethics Comm'n v. Wilson, 957 S.W.2d 794, 798 (Mo. Ct. App. 1997). The phrase "on recommendation of Civil Service Commission" is clearly implied into subsection 4(b) of Article XVIII, and thus, enactment of Ordinance 64923 without such recommendation was clearly invalid.

Appellants argue that the doctrine of "expression unius est exclusio alterious" must be applied since Section 4(a) expressly includes the recommendation and Section 4(b) does not. This principle, however, is only one of the principles of statutory construction and as noted by the Missouri Supreme Court: "The expressio unis maxim states an auxiliary rule or [sic] statutory construction which is sometimes followed and sometimes held inapplicable, depending on the facts. . . . The purpose of the rule is 'to ascertain the intention of the lawmakers' and 'must be applied with caution.'" Reorganized Sch. Dist. No. R-8 v. Robertson, 262 S.W.2d 847, 850 (Mo. 1953). The ultimate factor remains the framers' intent and, as established, the intent was clearly to require Commission recommendation for all civil service ordinances.

In fact, in direct conflict with the Appellants' argument, the Missouri Supreme Court has already ruled on this issue, holding that the recommendation requirement should be applied to all subsections of Section 4, including those where it is not expressly stated. See Abernathy v. City of St. Louis, 313 S.W.2d 717 (Mo. 1958). For this Court to now hold otherwise would be contrary to the Missouri Supreme Court's opinion in Abernathy.

Appellants refer to language of the trial court noting that if it were "writing on a blank slate," the court could agree with Appellants. For this reason, Appellants seek to

distinguish Abernathy. However, as just explained, even without the Missouri Supreme Court's explicit holding in Abernathy, the trial court should have reached the same conclusion. When the principles of statutory construction are applied, it is clear that the framers of the Charter intended the Commission recommendation to be a requirement for all ordinances related to civil service, including those affecting retirement.[2]

2. The "If and When Permissible" Language of Sections 4(b) and 7(b)(2) Do Not Limit the Commission's Duty to Recommend Ordinances Regarding Employee Retirement Systems.

Appellant Firefighters argue that the power of the Commission to recommend is limited because of the clause "if and when permissible under the Constitution and laws of the State of Missouri," stating "the state law system governing the FRS does not authorize mandatory recommendation power sought by the Commission." See Firefighters' Brief at 16. The state constitution and statutes do not prevent Commission recommendation, and Appellants are wrong in arguing that the state law must explicitly authorize the Commission recommendation.

Section 7 of the City Charter states that the Commission shall have the power, and it shall be its duty:

> To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for . . . (2) a plan for a system for retirement of

[2] The applicability to this case of the court's decision in Abernathy is described in detail in Part I (C) of this Brief. See infra pp. 34-38.

> superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri; . . .

St. Louis City Charter art. XVIII, § 7(b). The phrase "if and when permissible under the Constitution and Laws of the State of Missouri" modifies the language, "a plan for a system for retirement . . .," and addresses whether state enabling legislation has been enacted authorizing the establishment of a retirement system or authorizing the change at issue. It does not modify the Commission's right to recommend. In accord with the concept of enabling legislation, the Commission can only recommend a plan for a system for retirement of City employees if such system is permissible under the constitution and laws of the State of Missouri.

The City firefighters are City employees in the classified service. (L.F. at 66-67). The Ordinance pertains to the firefighters' compensation, with respect to the accrual of sick leave and by designating how such accrued sick leave may be used by a retiring firefighter, and also pertains to the retirement plan for the firefighters. Pursuant to Abernathy, the Missouri Supreme Court held that the recommendation requirement in Article XVIII, section 4 of the City Charter applies to all subsections of section 4. Further, pursuant to Article XVIII, section 7(b) of the City Charter, Commission recommendation is expressly required regarding compensation and retirement issues. Pursuant to Kirby v. Nolte, 173 S.W.2d 391, 392 (Mo. 1943) (en banc), the recommendation language in Article XVIII of the City Charter is mandatory. Since the Ordinance pertains to compensation, and since the Ordinance pertains to a change in the Firemen's Retirement System, which is permissible under the laws of the State of

Missouri (the enabling legislation), the recommendation of the Commission was clearly required. Absent such recommendation, the Ordinance is void, and the trial court did not err in so finding.

Appellants make several assertions related to the fact that the DROP program has enabling legislation enacted by the Missouri Legislature. Appellants emphasize that there is state legislation authorizing the City to enact the DROP program and therefore, the Appellants argue, the City Charter requirements with respect to enacting the Ordinance should be ignored. Firefighters' Brief at 16-19. The Commission does not claim that the City Charter provisions control over state law. The law is clear that a city charter must be consistent with state law. A provision of a city charter that conflicts with a state statute is void. City of Springfield v. Goff, 918 S.W.2d 786, 789 (Mo. 1996) (en banc). No conflict exists here between the state statute and the City Charter.

A conflict exists between a charter provision and state law where the charter permits what the statute prohibits, or prohibits what the statute permits. Id. See also Whitaker v. City of Springfield, 889 S.W.2d 869, 871 (Mo. Ct. App. 1994). There is nothing in Section 87.120 et seq. that prohibits the City from requiring a recommendation from the Commission on ordinances relating to compensation and retirement issues for City employees. In fact, the cases cited by Appellants clearly note that Section 87.120 is enabling legislation, which is solely permissive, not directory. See Trantina v. Bd. of Trs. of Firemen's Ret. Sys., 503 S.W.2d 148, 152 (Mo. Ct. App. 1973); Firemen's Ret. Sys. v. City of St. Louis, 789 S.W.2d 484, 487 (Mo. 1990) (en banc). Enabling legislation, standing alone, is inoperative. Trantina, 503 S.W.2d at 152. As a result, there is no

conflict between the statutes and the charter, and thus, the recommendation requirements of Article XVIII of the City Charter clearly apply to this situation.

Cities may develop their own procedures and conditions for enactment of ordinances. The people of the City of St. Louis, through the charter, may impose limits upon the Board of Aldermen's legislative power, such as requiring the recommendation of the Commission. Kirby, 173 S.W.2d at 392. Appellants argue that "There simply is no place, need or justification for another check or control on this system. . . ." Firefighters' Brief at 19. It is not Appellants' decision to make. Rather, the need for such a check was determined by the people of the City of St. Louis in enacting the Charter. As a result, regardless of Appellants' opinion as to the reason for such a requirement, it still must be followed.

The fact that Section 87.371 of the Missouri Statutes, as amended, allows any member who is participating in the DROP program to elect to have the equivalent of his sick leave placed into his DROP account, does not mean that the Ordinance, incorporating this requirement to mirror the statute, is automatically valid. Nor does it negate the limits placed on the Board of Aldermen by the City Charter. The Missouri courts have repeatedly noted that although the Missouri Legislature may amend sections of Chapter 87 of the Missouri Statutes, the City of St. Louis is not required to amend its ordinance provisions, nor are they automatically amended. See Firemen's Ret. Sys. v. City of St. Louis, 911 S.W.2d 679 (Mo. Ct. App. 1995); Firemen's Ret. Sys. v. City of St. Louis, 754 S.W.2d 21 (Mo. Ct. App. 1988); Trantina, 503 S.W.2d at 152.

Appellant Firefighters cite to Trantina v. Board of Trustees of the Firemen's Retirement System in asserting that the authority of the Commission to recommend is restricted by state law. Firefighters' Brief at pp. 16-17. The court in Trantina directly addressed the issue of whether amended Retirement System statutes pre-empt the Firemen's Retirement System ordinances and, if not, whether the ordinance is either voided or automatically amended upon the amendment of the statute. 503 S.W.2d at 150. The City of St. Louis had enacted Ordinance 55177 in 1968 to provide for a formula for computing benefits based upon Section 87.175 of the Missouri Statutes, RSMo. Supp. 1967. Id. In 1969, the Missouri Legislature amended Section 87.175. Id. Trantina retired in 1971 and the City computed his benefits based upon Ordinance 55177, rather than the formula set forth in Section 87.175, as amended, RSMo. Supp. 1969.

Trantina argued that Ordinance 55177 was superseded by the act of the legislature in amending Section 87.175; that since Ordinance 55177 was inconsistent with the statute, the ordinance was void and with the amended statute being the only prescribed formula for computation of benefits, it must apply. Id. at 150-51.

The court looked to the enabling statute, noted that it said the City "is hereby authorized" to enact ordinances providing for the firemen's retirement system, and stated that "the statute is permissive and it is therefore not obligatory for the City of St. Louis to enact implementing legislation, although it has done so in this instance by its enactment of Ordinance No. 55177, thereby establishing a firemen's pension plan for the City of St. Louis." Id. at 152.

The court noted that the statute grants the City the authority to establish a firemen's pension plan, but in order to have such a plan, the City must enact an ordinance. The City may or may not elect to enact such an ordinance. The court noted, "If it does, it must comply with the provisions of the enabling statute which is in effect at the time the ordinance is adopted." Id. Otherwise, the ordinance will be in conflict with the statute and void. Id.

The court then discussed the amendment, noting that only Section 87.175 was amended, and the enabling sections of the statute remained unchanged. Id. Trantina argued that Ordinance 55177 was in conflict with Section 87.175, as amended in 1969, and therefore void. The court dismissed this argument, stating, "We do not agree. Ordinance 55177 is consistent with the provisions of the enabling act authorizing its enactment in 1968 and is not in conflict therewith. Since the ordinance is not in conflict with the statute authorizing its enactment, the ordinance will stand." Id. at 152-153. The court noted, however, that if the City decides to change its pension plan benefits, it must increase them in accordance with the new guidelines set forth in the amended Section 87.175. Id. at 152.

The court concluded:

> [W]e find that Ordinance No. 55177 was enacted pursuant to the permissive enabling legislation of §§ 87.120 through 87.370; that it is still effective and not affected by the amendment to § 87.175, for the enabling legislation pursuant to which Ordinance No. 55177 was enacted was not repealed by the amendment to § 87.175. However, if St. Louis were to amend

> Ordinance No. 55177 to change the pension benefits, it must do so in accordance with the provisions of the statute in effect at the time of such ordinance amendment.

Id. at 153.

The Missouri Court of Appeals reiterated its position on the amendment issue in Firemen's Retirement System v. City of St. Louis. In this case, amendments were made to Chapter 87 of the Missouri Statutes so that the statutory formula to compute a retiree's benefits resulted in higher benefits than the ordinance formula because of the differing definitions of the term "average final compensation." 754 S.W.2d at 23. The Firemen's Retirement System argued that the ordinance is invalid because the ordinance did not adopt the entire statutory formula even though the City purportedly sought to make the Revised Code comply with the statutory guidelines. Id. at 24.

The court discussed Trantina, and found that it was controlling. Id. Under the facts, the court found that the ordinance at issue, Ordinance No. 59018, although making certain term changes, did not change the pension benefits formula, and therefore was not required to include the statutory changes. The court stated, ". . . the City was not required to amend its definitional section . . . to make it conform to the latest amendments to § 87.120(3) RSMo, the statutory section." Id. at 25. See also Firemen's Ret. Sys., 911 S.W.2d at 681 (noting in footnote that although statute had been amended in 1994 to provide for DROP program, City had not yet adopted an ordinance paralleling the statute, although it may decide to do so).

These cases clearly indicate that when the Missouri Legislature amended Chapter 87.371 governing the Retirement System, the City of St. Louis was under no obligation to enact an ordinance to comply with these changes. The City of St. Louis could continue operating without the DROP program option for sick leave hours. However, based on these cases, should the City of St. Louis choose to enact a valid ordinance amending the retirement system ordinance, such amendments would have to comply with Section 87.371. In sum, the Ordinance, if enacted, has to conform to the requirements of Section 87.371.

Here, however, the Ordinance is invalid. Under the City Charter, the Ordinance had to be recommended by the Commission. It was not, and is therefore void. The fact that this results in the City Ordinances not providing an option allowed under the recent amendment to the Missouri Statutes is irrelevant to the issue at hand, since the City was not obligated to enact the Ordinance in the first place. Moreover, the fact that this may be a difficult process for the Firemen's Retirement System to pursue to advocate changes to the current system is irrelevant. This procedure is established under law, and therefore must be followed. Should the Appellants believe it is inequitable or unfair, the remedy is to change the statutes or City Charter, not to ignore their requirements.

Article XVIII of the City Charter requires recommendation of the Commission before such an ordinance can be adopted by the Board of Aldermen. Such recommendation is permissible under state law. The Ordinance was enacted without Commission recommendation, and therefore, is invalid. As a result, the trial court did not err in issuing judgment for the Commission.

C. THE MISSOURI SUPREME COURT, IN ABERNATHY V. CITY OF ST. LOUIS, CLEARLY HELD THAT ANY ORDINANCE PERTAINING TO CIVIL SERVICE MUST RECEIVE COMMISSION APPROVAL BEFORE IT IS ENACTED AND ABERNATHY IS CONTROLLING IN THIS SITUATION.

In Abernathy v. City of St. Louis, 313 S.W.2d 717 (Mo. 1958), the Missouri Supreme Court held that an ordinance providing for overtime compensation, enacted without the recommendation of the Commission, was invalid. The ordinance at issue related to hours of duty and thus involved section 4(c) of the Charter. Section 4(c), like section 4(b) relating to retirement systems, does not contain an express reference to Commission recommendation. The Missouri Supreme Court, however, viewed the entire provisions of the charter, and held that Commission recommendation was required. As noted by the trial court, "Abernathy precludes argument about the meaning of art. XVIII, § 4(b)." (L.F. at 274).

Appellants argue that the trial court erred because Abernathy does not govern this dispute. Specifically, Appellants seek to distinguish Abernathy because it involved § 4(c), not § 4(b) related to retirement. See Retirement System's Brief at 27; Firefighters' Brief at 20. This distinction, however, is not relevant to the legal issues involved, and does not justify a departure from the clear dictates of the Missouri Supreme Court.

The Abernathy court referred to several provisions of Article XVIII of the City Charter, including Sections 2, 6, 7 and 4, and discussed the purposes of the provisions. The court concluded that the people of the City of St. Louis intended that the provisions

of the civil service system be amended or changed only after a careful consideration by the Commission. The court stated, "[t]o permit the Board of Aldermen to change or amend provisions of the ordinances pertaining to civil service without the recommendation of the [C]ommission would destroy the underlying purpose of Article XVIII, supra." Id. at 719.

In analyzing the charter provisions the court explained:

> Note that Section 7, supra, places upon the [C]ommission the duty to recommend to the Mayor and Aldermen ordinances to provide for '(3) regulation of hours of duty, holidays, attendance and absence;' and for '(5) such changes in any such matters from time to time as may be deemed warranted.' Then, notice the wording of Section 4 of Article XVIII wherein it is provided that 'The mayor and aldermen shall provide, by ordinance * * * on recommendation of the civil service commission * * * * (c) * * * For regulating hours of duty, holidays, attendance and absence, in the classified service.'

Id. Thus, the court concluded, the ordinance is void for the reason that it was not, before its passage, recommended by the Commission.

The Missouri Supreme Court in Abernathy clearly requires that any ordinance pertaining to civil service must receive Commission approval before it may be enacted. Thus, the trial court explained:

> It is at once obvious that the Supreme Court's ellipses have the effect of incorporating the qualifying language "on recommendation of the civil

> service commission" into all of the subsections of art. XVIII, § 4. Contrary to defendants' arguments, there is no sound reason to believe that the Supreme Court meant to carry that language into § 4(c), relating to ordinances governing hours of work, and not into § 4(b), relating to retirement systems. Nor is there any basis in the opinion to suggest that the decision turned on the meaning of the term "compensation" as used in § 4(b). The Supreme Court held that an ordinance regulating the hours of work of City civil servants could not be enacted without recommendation of the Civil Service Commission. *A fortiori*, ordinances regulating retirement systems must be recommended by the Commission, and that prerequisite is mandatory. Kirby v. Nolte, supra. The portions of the Supreme Court's opinion quoted above cannot be characterized as dicta, and, even if it were, this Court would be hard put to ignore the express views of the Supreme Court, dicta or no.

(L.F. at 272-273). Under Abernathy, it is clear that Ordinance 64923 is invalid because the Commission did not recommend it.

As noted by the trial court, there is no sound reason to believe that the Missouri Supreme Court would require Commission recommendation for Section 4(c) relating to ordinances for hours of work, and not Section 4(b) addressing ordinances affecting retirement systems. Appellants have presented no such sound reasons on appeal. It is clear that Abernathy requires Commission recommendation for any ordinance pertaining to civil service. In fact, the Abernathy court expressly so stated in noting that permitting

the Board of Aldermen "to change or amend provisions of the ordinances pertaining to civil service without the recommendation of the Commission" would destroy the underlying purposes of Article XVIII. 313 S.W.2d at 719 (emphasis added). Thus, Appellants are wrong in arguing that Abernathy does not apply.[3]

The Missouri Court of Appeals is constitutionally bound by decisions and rulings of the Missouri Supreme Court. Van Vooren v. Schwarz, 899 S.W.2d 594, 595 (Mo. Ct. App. 1995). See also Klein v. Abramson, 513 S.W.2d 714, 718 (Mo. Ct. App. 1974) (decisions of supreme court were absolutely binding upon court of appeals). The appellate court is "bound to interpret the law as it is written, . . . [and is] bound by the law as it has been last declared by the Supreme Court." Osborn v. Osborn, 274 S.W.2d 32, 40 (Mo. Ct. App. 1954). See also State ex rel. Dean v. Daves, 14 S.W.2d 990 (Mo. 1929) (supreme court's construction of statutes necessary to decision of issues constituted "controlling authority" on court of appeals).

The holding in Abernathy applies directly to this case. Appellants have not shown that the trial court was incorrect in relying on the Supreme Court's dictate. Thus, this Court must also follow Abernathy and affirm the trial court's decision.

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[3] Appellant Firefighters again argue that this case is different from Abernathy because it involves the firefighters retirement system, and the retirement system is somehow exempt from the civil service requirements in the Charter. See Firefighters Brief at 22. As explained, the fact that there is state enabling legislation for the retirement system does not exempt it from the procedural requirements of the statute. See supra pp. 27-28.

II. THE TRIAL COURT DID NOT ERR IN DECLARING ORDINANCE 64923 VOID AND INVALID BECAUSE THE COMMISSION'S PRIOR FAILURE TO RECOMMEND SUCH ORDINANCES IS NOT RELEVANT IN THAT IT DOES NOT CONSTITUTE WAIVER OR LACHES UNDER THE LAW.

Appellants argue that the Commission has waived its right to recommend ordinances affecting the Firemen's Retirement System, and that the failure of the Commission to raise this issue in the past is a further basis for holding Ordinance 64923 valid. Retirement System's Brief at 36. Appellants are wrong.

Waiver occurs if the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law, and they failed to do so. State ex rel. York v. Daugherty, 969 S.W.2d 223, 225 (Mo. 1998) (en banc). Certainly, the Mayor, Board of Aldermen, and Appellants in this case were all aware of the Commission's position that its recommendation was required before the City ever enacted the Ordinance. See (L.F. at 62); (L.F. at 63). Furthermore, the fact that the Commission did not object to previous ordinances enacted without its recommendation does not constitute waiver under the law.

A waiver is the intentional relinquishment of a known right. Acetylene Gas Co. v. Oliver, 939 S.W.2d 404, 409 (Mo. Ct. App. 1996); Howe v. Lever Bros. Co., 851 S.W.2d 769, 775 (Mo. Ct. App. 1993). If waiver is to be implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the right. Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386-87 (Mo. 1989) (en banc). To rise to the level of waiver, the conduct must be so manifestly consistent with and indicative of an

intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible. Acetylene, 939 S.W.2d at 409. Waiver can bind no one unless it was made with full knowledge of the rights intended to be waived. Cameron v. Norfolk & W. Ry., 891 S.W.2d 495, 500 (Mo. Ct. App. 1994).

In addition, in order for waiver to be effective, absent any element of estoppel, it must be founded on or supported by a consideration, especially if substantial, as distinguished from formal, rights are involved. Conservative Fed. Sav. & Loan Ass'n v. Warnecke, 324 S.W.2d 471, 480-81 (Mo. Ct. App. 1959); Mitchell v. Am. Mut. Ass'n, 46 S.W.2d 231, 237 (Mo. Ct. App. 1932).

No action attributable to the Commission constitutes a clear, unequivocal, or express intent to waive its legal right to recommend ordinances affecting compensation and retirement plans for City employees, including the Firefighters. Moreover, there was no evidence to show consideration for the alleged waiver.

Appellant Firefighters argue that the Commission waived its right to recommend any compensation or retirement plan for firefighters because it has elected not to recommend on these issues for the last fifty years. Missouri courts are clear that forbearance does not constitute a waiver. Kroh Bros. Dev. Co. v. State Line Eighty-Nine, Inc., 506 S.W.2d 4, 12 (Mo. Ct. App. 1974). Forbearance is the "act of refraining from enforcing a legal right, obligation or debt." Black's Law Dictionary 262 (pocket ed. 1996). The Commission did not waive its legal right to make recommendations on compensation plans for employees simply because it did not assert its recommendation on previous ordinances effecting the compensation of firefighters. This act does not

constitute a clear, unequivocal, or express intent to waive its legal right to make recommendations on ordinances that affect the compensation of civil service employees, including firefighters.

Furthermore, as the Appellant Firemen's Retirement System has admitted, and in fact relied on, previous City Counselors advised the Commission it did not have authority to recommend ordinances such as the Ordinance at issue. See Retirement System's Brief at 22. The Commission, therefore, relying on such opinions did not object to the failure by the Board of Aldermen to acquire its recommendation. However, in 1999, the Commission again requested an opinion from the City Counselor as to its authority to recommend certain ordinances. See (L.F. at 257-258). The City Counselor, on April 10, 1999 opined, "[i]t is the opinion of this office that amendments to either retirement system [the Firemen's Retirement System and/or the Employee's Retirement System] are subject to the limitation that they must be recommended by the Civil Service Commission." Id. Promptly after receiving such opinion, the Commission took all reasonable steps to exercise its rights. As a result, the Commission has not waived its right to object to the Ordinance.

The doctrine of laches is also inapplicable to the present action.[4] Laches is an equitable doctrine that unreasonable delay bars a claim if the delay is prejudicial to the

[4] Appellant Retirement System asserts in its Point Relied On that the Commission's failure to act constitutes laches, yet fails to discuss laches in its Argument. Without any discussion, this Court should not rely on laches to reverse the trial court's judgment.

defendant. Mississippi-Fox River Drainage Dist. No. 2 v. Plenge, 735 S.W.2d 748, 754 (Mo. Ct. App. 1987). While these are the general standards, each case and its facts must be dealt with individually. Id.

Invocation of laches requires that a party with knowledge of the facts giving rise to his rights delays assertion of them for an excessive time and the other party suffers legal detriment therefrom. Ward v. Hudgens, 22 S.W.3d 260, 264 (Mo. Ct. App. 2000); Blackburn v. Richardson, 849 S.W.2d 281, 289 (Mo. Ct. App. 1993); Rich v. Class, 643 S.W.2d 872, 876-877 (Mo. Ct. App. 1982); McDaniel v. Frisco Employees' Hosp. Ass'n, 510 S.W.2d 752, 756 (Mo. Ct. App. 1974). In order for delay to support the doctrine of laches, it must be unreasonable and unexplained and must be shown to have caused disadvantage and prejudice to the defendant. Ward, 22 S.W.2d at 264. But it does not apply where "no one has been misled to his harm in any legal sense by the delay, and the situation has not materially changed." Metro. St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643, 657 (Mo. 1973). In considering the doctrine, the court should give regard to the equities and conduct of all the parties. Stenger v. Great S. Sav. & Loan Ass'n, 677 S.W.2d 376, 383 (Mo. Ct. App. 1984). Laches, however, is not a favored doctrine and equity does not encourage its invocation to defeat justice, but only to prevent injustice. Blackburn, 849 S.W.2d at 289-290.

The doctrine of laches does not apply to this case. First, there has been no unreasonable delay. The Ordinance became effective on April 17, 2000. (L.F. at 63). This lawsuit was filed on October 19, 2000. Clearly six months does not constitute an unreasonable delay. The Commission went through the process of requesting outside

counsel from the City Counselor, the City Counselor advertised for counsel, proposals were submitted, and counsel was selected, all in compliance with the time consuming requirements of Ordinance 64102. There was no delay on the part of the Commission in pursuing this lawsuit.

Second, there is no showing of prejudice to the Defendants. Despite the Appellants' allegations to the contrary, the firefighters will still receive their accrued sick leave upon retirement. If the sick leave were not deposited into a DROP account, then the City would pay the accrued sick leave to the retired firefighters. No retired employee will lose the value of his or her accrued sick leave. Ordinance 64954 provides, "[a]n active employee who is a member of the Employees Retirement System or the Firemen's Retirement System, and who applies for retirement and immediately retires from active service, shall receive payment for his/her sick leave balance . . ." (L.F. at 240-241). Further, the Firefighters claim that 15 firefighters who have retired since April 2000 elected to have their accumulated sick leave placed in their DROP accounts. The Firefighters further claim an additional 132 firefighters are eligible to retire. Nowhere in the Firefighters' Brief, however, do they demonstrate that any retired firefighter would not have retired absent the Ordinance or that any retired firefighter would be prejudiced if the Ordinance were declared void.

Moreover, the doctrine of laches should not be applied to the Commission because it is a governmental entity. There is no Missouri case in which a state agency has been barred from enforcing its statutory duty on the basis of laches. Early Missouri cases acknowledged the general doctrine that laches is not imputable to state government. See

Marion County v. Moffett, 15 Mo. 604 (Mo. 1852). See also Parks v. State, 7 Mo. 194 (Mo. 1841). In Boals v. Garden City, the Missouri Court of Appeals addressed the issue of whether a suit to vacate an ordinance, 20 years after the passage of the ordinance, was barred by the doctrine of laches. 50 S.W.2d 179 (Mo. Ct. App. 1932). The court held that delay only is not sufficient to deny relief. Id. at 182. The court stated "[u]nless delay in seeking remedy would result in an injustice to defendant, the remedy should not be denied." Id. Defendants fail to demonstrate any injustice.

The Commission should not be barred from enforcing its legal right to make recommendations on issues of compensation and retirement for employees. Thus, the doctrine of laches does not prevent the Commission from seeking relief.

Appellants argue that the Supreme Court's decision in Firemen's Retirement System of St. Louis v. City of St. Louis indicates that the Commission's failure to act is a relevant factor. Retirement Systems' Brief at 35-38. Firemen's Retirement System is an entirely different case.

Firemen's Retirement System involved a dispute between the Firemen's Retirement System and the City as to which entity had the authority to select a secretary to the Retirement Board, not a dispute between the various parts of the City – Mayor, Board of Aldermen, and the Commission. Firemen's Ret. Sys. v. City of St. Louis, 789 S.W.2d 484 (Mo. 1990) (en banc). The court held that pursuant to the enabling legislation of Section 87.120 of the Missouri Statutes, the Firemen's Retirement System had such authority. Id. at 486.

The present case does not involve a question of authority between the Firemen's Retirement System and the City. Rather, this lawsuit involves a question as to which entity of the City, as between the Board of Aldermen and the Civil Service Commission, has authority with respect to ordinances regarding compensation and retirement benefits for City employees in the classified service. There is no question raised in this case regarding the authority or rights of the Firemen's Retirement System. The question is solely whether the Board of Aldermen has the authority to enact a certain ordinance without the recommendation of the Commission.

The issue in this case involves the process required under the City Charter to enact a certain type of ordinance. The Firemen's Retirement System case never reached the issue of what procedure pursuant to City Charter was required to enact an ordinance, because the court determined the City had no authority over the secretary position at issue in that case. Here, there is no question that the City has the authority to enact an ordinance on this matter, but rather the issue involves the procedure required within the City for doing so. Therefore, the court's opinion in Firemen's Retirement System is not relevant to this analysis.

The court in Firemen's Retirement System acknowledged that it was a different kind of case. The court in that case specifically noted that Article XVIII of the City Charter did not apply to the case, because the employment positions at issue were not within the City's service. 789 S.W.2d at 486. In this case, however, Article XVIII clearly is at issue since the affected employees are City employees in the classified service. (L.F. at 66-67). As a result, Firemen's Retirement System cannot be used to support the

position that Commission recommendation was not required with respect to the Ordinance.

Thus, despite Appellants' assertions to the contrary, the court's statement in Firemen's Retirement System that the City "has explicitly divested itself as a significant control of the pension funds (FRS) and its trustees," has no effect on whether the Commission has waived its right to recommend. The Commission's right to recommend relates to its powers and authority in relation to the Board of Aldermen, and not to the overall relationship between the City and the Retirement System. It is not the intent of the Commission to insert itself into the internal government of the Retirement System, but it is the Commission's intent to fulfill its obligations and duties under the City Charter. The Commission has not waived any rights and this Court should affirm the decision of the trial court.

CONCLUSION

The trial court acted properly in declaring Ordinance 64923 invalid because of the absence of the recommendation by the Civil Service Commission as required by Article XVIII of the City Charter. For the reasons stated above, the judgment of the trial court should be affirmed.

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CERTIFICATIONS OF COMPLIANCE PURSUANT TO RULE 84.06(c) AND VIRUS-FREE DISKETTE

The undersigned certifies, as required by Mo. Sup. Ct. Rules 84.06(c) and (g), that the Brief complies with Rule 55.03; the Brief complies with the requirements of Rule 84.06 (b), containing 11,766 words (determined by using the word processing software's word count function, excluding cover page, signature block, this certification and certificate of service); and the diskettes filed and served containing the word processing file of the Brief were scanned for viruses and are virus free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and exact copies of the foregoing Brief and a virus-free diskette containing said Brief has been sent via U.S. First Class Mail, postage prepaid, this 2nd day of January, 2002, to: Edward J. Hanlon, Esq., Deputy City Counselor, City Hall, Room 314, 1200 Market Street, St. Louis, Missouri 63103, Attorneys for Defendants Board of Aldermen, Harmon and City of St. Louis; Daniel G. Tobben, Esq., DANNA, McKITRICK, P.C., 150 North Meramec, Fourth Floor, St. Louis, Missouri 63105, Attorneys for Defendants-Intervenors The Firemen's Retirement System of St. Louis, et al.; and Richard P. Perkins, Esq., DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C., 7730 Carondelet Avenue, Suite 200, St. Louis, Missouri 63105, Attorneys for Defendant-Intervenors St. Louis Firefighters Association, Local 73, et al.